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Supreme Court, U.S.
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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH E. POWERS,
Petitioner,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

RICHARD J. ROME
(*Counsel of Record*)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67504-0964
(316) 662-2383
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

Did the Kansas Supreme Court err in approving the trial Court's decision, as well as that of the Kansas Court of Appeals, in denying that the Petitioner possessed a constitutionally protected property interest in his employment with the Respondent County and thereby deprived him of his property without due process of the law under the 14th Amendment to the U. S. Constitution?

TABLE OF CONTENTS

Question Presented for Review I
Table of Authorities III
Opinion Below 1
Jurisdiction 2
Constitutional Provisions Involved 2
Statement of the Case 2
Reason Why the Writ Should Be Granted 4
Conclusion 10

Appendix A—

Opinion Below, Order of the Kansas Supreme Court denying review, reported at Case No. 87-60767-A, dated August 26, 1988 ..... A1

Appendix B—

Unpublished Opinion of the Kansas Court of Appeals, reported at Case No. 60,767, dated June 24, 1988 ..... A2

TABLE OF AUTHORITIES

Cases

Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed. 2d 684 (1976) 6

Gorham v. City of Kansas City, 225 Kan. 369, 590 P.2d 1051 (1979) 7, 8

Johnson v. National Beef Packing Co., 220 Kan. 52 ..... 4, 5

Johnston v. Farmers Alliance Mutual Ins. Co., 218 Kan. 543, 545 P.2d 312 4

Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 5

May v. Santa Fe Trail Transportation Co., 189 Kan. 419, 370 P.2d 390 5

Miller v. City of Mission, Kan., 705 F.2d 368 (1983) 8

Morriss and White v. Coleman Co., 241 Kan. 501 9-10

Swart v. Huston, 154 Kan. 182, 117 P.2d 576 5

Wichita Council v. Security Benefit Ass'n., 138 Kan. 841, 28 P.2d 976 7

Will v. City of Herington, 201 Kan. 627, 443 P.2d 667 (1968) 7

Constitutional Provision

United States Constitution, Amendment XIV 2, 6

Statute

Civil Rights Act 1871, 42 U.S.C. 1983 6

Other

53 Am. Jur. 2d, *Master and Servant*, Sect. 43, pp. 117-118 5

Personnel Rules and Regulations 3, 5, 6, 7, 9

The New Webster Encyclopedic Dictionary of the English Language 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

OPINION BELOW

The order of the Kansas Supreme Court denying review is reported at Case No. 87-60767-A, dated August 26, 1988, and attached hereto as Appendix A. The unpublished opinion of the Kansas Court of Appeals is reported as Case No. 60,767, dated June 24, 1988, and attached hereto as Appendix B.

JURISDICTION

The opinion of the Kansas Court of Appeals was filed June 24, 1988. The order of the Kansas Supreme Court denying review was filed August 26, 1988.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The instant petition for a writ of certiorari is filed within the period of extension granted by Associate Justice Byron R. White on November 22, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 1, 1978, the Appellant was hired by the Appellee, Kingman County, Kansas, through a government CETA Program. A year later he was hired as a permanent county employee. His duties were those of a general laborer with the Kingman County Public Works Department, initially with the road and bridge crew and then in solid waste collection, a trash truck. While working on the back of a trash truck on April 20, 1978, Appellant injured or smashed his hand. This injury neces-

sitated medical attention for the Appellant for the next two or three years, including surgery and hospitalization. This injury caused the Appellant to miss a considerable amount of work over the years. As of January 1, 1982, he was off at least from July 2 or 3, 1981, as a result of the injury. He was rebased to go back to work on or about March 15, 1982.

During the aforesaid period of time the Appellant filed a workers' compensation claim against Kingman County. On January 5, 1982, he was terminated from his job by the Appellee. He received actual notice of the termination of his job or employment, in writing, on February 19, 1982, after having inquired about it for some three weeks.

Mr. Powers was never notified by the Appellees, or anyone, prior to January 5, 1982, that he was to be terminated. He was never afforded an opportunity to be heard as to whether or not he should be terminated.

Appellant contended, in his pretrial questionnaire, 7(e), that he intended to present in evidence his written request for a hearing by the Board of County Commissioners, on January 17, 1982. The Court never decided the mixed question of fact as to whether or not the Appellant had requested a hearing before the Commissioners.

There was no written contract of employment between the Appellant and the Appellee.

On January 21, 1980, the Appellee Commission formally adopted what was received by the Court as Plaintiff's Exhibit 1, and entitled: *Personnel Rules and Regulations, Kingman County, 1980.*

All of Appellant's absences from work were with leave, especially from July 14, 1981, to January 5, 1982, and he was considered to be a good employee.

REASON WHY THE WRIT SHOULD BE GRANTED

The Kansas Supreme Court's Approval of the Petitioner's Firing by the Respondent County Without a Hearing Constituted a Violation of Petitioner's Right Under the U. S. Constitution to Due Process and Equal Protection of the Law.

In its conclusions of law, filed on March 11, 1987, the trial court below makes six distinct pronouncements. In three of those distinct pronouncements it states that Kansas is an "at will" employment State unless an express term of employment is contracted or there is an express contract of employment. That is not the law in Kansas now, nor has it ever been. Kansas has always recognized the theory of an implied contract of employment. The trial court below incorrectly considered only the standard of an express contract of employment in spite of the fact that both parties stipulated that there was no express written contract.

The Supreme Court of Kansas in *Johnson v. National Beef Packing Co.*, 220 Kan. 52, stated at the top of page 54:

> "This court follows the general rule that in the absence of a contract, *express or implied*, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party. . . . . (*Johnston v. Farmers Alliance Mutual Ins. Co.*, 218 Kan. 543, 545 P.2d 312;

Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449; *May v. Santa Fe Trail Transportation Co.*, 189 Kan. 419, 370 P.2d 390; *Swart v. Huston*, 154 Kan. 182, 117 P.2d 576; and *53 Am. Jur. 2d, Master and Servant*, Sect. 43, pp. 117-118.)" [Emphasis supplied.]

The high Court, throughout *Johnson*, supra, and the other cases and authorities cited therein, continually refer to the terms express or implied contracts of employment. Clearly a trial court must consider both theories in the type of case at hand.

In January, 1980, Kingman County adopted certain "Personnel Rules and Regulations". Those rules, which are a part of the record herein, provide in part:

"I-1 RULES ESTABLISHED

The following rules, regulations and other administration are established to:

(c) Develop a program of recruitment, advancement and *tenure* which will make the county service attractive as a career. [Emphasis supplied.]

I-2 ADMINISTRATIVE RESPONSIBILITY

The personnel program consists of the sum total of all policies and procedures related to personnel administration in the service of the county and shall be administered by the Board of County Commissioners. *The policies and procedures of the personnel program shall apply to all employees in the service of the county* except elected officials, court employees, and shared city-county staff or as otherwise noted in the text." [Emphasis supplied.]

The *Rules* also provide for a probationary period of employment and define a "permanent" employee as one who has completed the probationary period of employment.

Finally, the *Rules* provided for separation or termination in Article VII. The *Rules* only recognize and provide for the following types of terminations:

1. Removal for cause;
2. Resignation;
3. Retirement; and
4. Termination for lack of funds.

The *Rules* are explicit as to how each of these terminations are handled.

The Appellant contended ab initio, and still does, that he had an expectancy or entitlement to continued employment amounting to a property interest which is protected by the due process clause of the Fourteenth Amendment to the U. S. Constitution. This action is brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. 1983.

The Fourteenth Amendment to the U. S. Constitution prohibits a state from depriving a person of liberty or property without due process of law. The threshold question in this case is whether the Appellant possessed a constitutionally protected property interest in his employment with Kingman County. The determination of this issue is governed by the law of the State of Kansas. See: *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). *Bishop*, supra, also relates in part:

> "A property interest in employment sufficient to invoke procedural due process protections need not be a formal contract or a tenure system, but may be created by ordinance or by implied contract."

The *Rules,* which governed the terms and conditions of the Appellant's employment with Kingman County, as well as most all other county employees, created an expectation of continued employment. Appellant was certainly not a part-time or seasonal employee. He was not an elected official. He was not on a combined city-county staff. The record below is replete with references to the use by all county officials of the "rule book" (The *Rules*). The record proves beyond a shadow of a doubt that the Appellant had passed the probationary period for permanent employees as prescribed in Article III of the *Rules.* The *Rules* provided for career employment with the County as well as tenure. Work weeks are defined. Compensation is provided for as well as fringe benefits - medical and hospital insurance, vacation pay, leave, retirement program, and training programs. The *Rules,* as stated before herein, provided, specifically, the ways an employee can be terminated. One reason is for cause. On their face, the *Rules* may fairly be read as creating a reasonable expectation of continued employment absent noncompliance with one of the specified reasons.

Kansas has consistently held that where a discharge is "for cause", notice and hearing are required. *Gorham v. City of Kansas City,* 225 Kan. 369, 373, 590 P.2d 1051 (1979), citing *Will v. City of Herington,* 201 Kan. 627, 443 P.2d 667 (1968). The high Court discussed "cause" as far back as 1934 in *Wichita Council v. Security Benefit Ass'n.,* 138 Kan. 841, 28 P.2d 976, wherein it stated:

"The word 'cause' . . . means what is sometimes spoken of as legal cause, or just cause, a substantial, reasonable or just cause, related to matters of a substantial nature, pertaining to duties or obligations imposed. (Citations omitted).

"The word carries with it the necessity of an appropriate charge, or accusation, ..."

In the case at hand the Appellee fired or terminated the Appellant on January 5, 1982, without the latter's knowledge. In fact, the record shows that the Appellant went from office to office in Kingman to find out when and why he was terminated. There is an indication that he requested a hearing on January 17, 1982, and didn't receive one. He received an actual, written notice of termination on or about February 19, 1982. The Tenth Circuit Court of Appeals of the U. S., in *Miller v. City of Mission, Kan.*, 705 F.2d 368 (1983), stated that:

"Due process also requires that one be given notice of the charges against him a reasonable time before the hearing is to take place. . . ."

"Moreover, except in emergency situations, due process requires that the hearing be held before termination becomes effective. . . ."

No pretermination hearing occurred here. No post-termination hearing was held. Further amplifying *Gorham*, supra, Appellant notes syllabus number one which states:

"A public employee who may be discharged only 'for cause' has a property interest in continued employment; such an employee is entitled to a due process hearing before termination."

It is abundantly clear that the Appellant had a protected property interest in this case. He was, as such, entitled to some kind of hearing before being deprived of this interest. He received none.

Tenure is defined by *The New Webster Encyclopedic Dictionary of the English Language* as:

> "The act, manner or *right* of holding property. . . ." [Emphasis supplied.]

The Kingman County *Rules* clearly applied to Appellant and were adopted for the explicit purpose of granting tenure to county employees. The language was explicit in granting the Appellant and others the right to continued employment under the terms and conditions set forth in the *Rules*.

This writer did not represent the Appellant in the matter below and is, therefore, at a disadvantage in recalling the exact procedure employed by the trial court. The case was filed in December of 1982. A decision was not rendered until March 11, 1987, a period of around 4½ years. The only evidentiary hearing was held on October 17, 1985, and it was not a trial as such. In actuality it probably amounted to, or was equivalent to, a summary judgment hearing. No trial, either to the court or a jury, was ever held. Suggested findings of fact and conclusions of law were submitted by both sides by the end of 1985. "Final Arguments" were scheduled at one time for July 18, 1986. The decision came, as shown by the record, on March 11, 1987.

If this case is treated as one involving summary judgment, as indeed it has to be, then the Court should consider the matter in light of *Morriss and White v. Coleman*

Co., 241 Kan. 501, decided June 12, 1987, and affirming an unpublished decision of the trial court filed November 26, 1986. The court held that there was the existence of a legitimate issue of fact whether there was an implied contract that employees would not be terminated without just cause, and summary judgment was precluded. The court further held that the facts must be more fully developed to determine liability for tortious interference. In our case at hand the trial judge failed to even discuss tortious interference. The case should be reversed pursuant to the dictates of *Morriss*, supra.

CONCLUSION

For the reasons and arguments stated herein, the Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Kansas, to review that Court's decision which, in effect, affirmed the decisions of the Kansas Court of Appeals and the trial court denying the Constitutional rights of the Petitioner.

Respectfully submitted,

RICHARD J. ROME
(Counsel of Record)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67504-0964
(316) 662-2383
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE
SUPREME COURT OF THE STATE
OF KANSAS

No. 87-60767-A

Joseph E. Powers,
Appellant,

v.

The Board of County Commissioners of Kingman County, KS, et al.,
Appellee.

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date August 26, 1988

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 60,767

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

JOSEPH E. POWERS,
Appellant,

v.

THE BOARD OF COUNTY COMMISSIONERS OF
KINGMAN COUNTY, KANSAS, *et al.*,
Appellees.

MEMORANDUM OPINION

Appeal from Kingman District Court; WILLIAM H. YANDELL, judge. Opinion filed June 24, 1988. Affirmed.

Richard J. Rome, of Hutchinson, for appellant.

Mary Kathleen Babcock, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, for appellees.

Before SIX, P.J., LARSON, J., and PAUL E. MILLER, District Judge, assigned.

PER CURIAM: This is an appeal brought by Joseph E. Powers, appellant, from a decision of the Kingman County District Court in favor of the Board of

Commissioners of Kingman County. Powers had brought suit against Kingman County alleging that his employment with the county had been wrongfully terminated in violation of his civil rights. Powers raises three issues on appeal, which are stated hereafter. Since the facts are well known to the parties, only those necessary for discussion of the issues will be set forth herein.

Powers' first issue on appeal is whether the trial court erred in concluding as a matter of law that Kansas is an "at-will" employment state unless an express contract of employment exists. This issue is based upon Powers' interpretation of the trial court's decision, upon the fact that the parties stipulated that Kingman County had formally adopted certain personnel rules and regulations, and upon Powers' belief that the trial court gave no consideration to the possibility that an implied contract existed between Powers and the County based on the adoption of the personnel rules.

His second issue is whether an implied contract existed between the parties, thereby creating an expectation of continued employment amounting to a property interest protected by the due process clause of the Fourteenth Amendment. Because they are interrelated, we will treat these two issues together.

Powers cites *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), in support of his conclusion. There, at page 54, the Supreme Court stated:

> "This Court follows the general rule that in the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party, and the employee states no

cause of action for breach of contract by alleging that he has been discharged."

The trial court apparently refused to accept the stipulation that the personnel rules and regulations had been formally adopted and, in fact, specifically found that no formal adoption of them had taken place. It further found Powers had never been informed that he was employed under the rules and, even if the rules had been impliedly adopted, they did not amount to an express contract of employment.

No Kansas case that we have been able to find speaks to the effect of a trial court's refusal to accept a stipulation, especially where one party continues to profess reliance thereon, as appellant did in this case. However, even if the trial court should have accepted the stipulation of the parties, instead of relying on the clear evidence that the regulations had *not* been adopted (a holding we are not prepared to make), the facts of this case show that the trial court came to the correct conclusion.

Clearly, there existed no express contract of employment. Powers went to work for Kingman County on March 1, 1978. The rules and regulations, if adopted, were instituted in December 1979 or January 1980. They were not negotiated with any employee, including Powers, nor with any employee group.

In *Johnson*, the Supreme Court had this to say:

"[T]he manual was not published until long after plaintiff's employment. It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any ben-

> efits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy." 220 Kan. at 55.

The instant situation is the same. There are no facts to support either an express or an implied contract and, thus, appellant remained an "at-will" employee.

Powers' third issue is whether the trial court erred in failing to consider the theory of tortious interference with appellant's contract rights. Powers relies on *Morriss v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987), in an attempt to establish such a claim. This theory was never raised by Powers at any time in the court below. "A point not raised before or presented to the trial court cannot be raised for the first time on appeal." *Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan. 548, 552, 731 P.2d 273 (1987). For this reason, the issue is not properly before the court and need not be addressed.

Affirmed.